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No. 08-212

IN THE

Supreme Court of the United States

EXXON MOBIL CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petition for Writ of Certiorari To the United States Court of Appeals For the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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MOTION OF WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF) respectfully moves for leave to file the attached brief as *amicus curiae* in support of Petitioner. Counsel for Petitioner has consented to the filing of this brief, as has counsel for Respondents Federal Energy Regulatory Commission, ConocoPhillips Alaska, Inc., Petro Star Inc., and Flint Hill Resources Alaska, LLC. Counsel for *amici* wrote to counsel for Respondents Williams Alaska Petroleum Inc., OXY USA, Inc., and Union Oil Co. of California by letters dated September 3, 2008 to request consent, but did not receive a response. Accordingly, this motion for leave to file is necessary.

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending free-enterprise, individual rights, and a limited and accountable government. In particular, WLF has regularly appeared in this Court and other federal courts to support its view that separation-of-powers principles embedded in the U.S. Constitution bar any branch of the federal government from exercising powers rightfully belonging to another branch. *See, e.g., Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995).

WLF is concerned that the decision below eliminates all constraints on the ability of Congress to direct a result in a particular judicial proceeding, without repealing or amending the general law underlying the litigation. WLF believes that at least

some restraints of that type are necessary to ensure that Congress exercises only those powers delegated to it under the Constitution and that its proceedings are not corrupted by the ability of a few individuals to obtain special treatment not available to others. Adherence to the rule of law demands nothing less.

WLF has no direct interest in the outcome of this litigation, financial or otherwise. Accordingly, WLF can provide the Court with a perspective not shared by any of the parties.

For the foregoing reasons, the Washington Legal Foundation respectfully requests that it be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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QUESTION PRESENTED

Whether the Constitution permits Congress to enact legislation dictating the retrospective remedy available to private parties in a single pending adjudication, while creating a different legal standard that will apply in all future proceedings of the same kind.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTERESTS OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE PETITION 4

I. This Case Is a Good Vehicle for Providing Guidance on *Klein*, Because Congress Did Not Amend Applicable Law When It Prescribed a Rule of Decision in the Case 8

II. This Case Raises Separation-of-Powers Concerns in the Starkest Manner Possible: It Singles Out One Adjudication for Special Treatment 12

III. Separation-of-Powers Analysis Provides the Most Appropriate Means of Addressing Cases of This Sort 16

IV. *Klein* Applies to Cases, as Here, That Involve Proceedings Both Before Article III Courts and Before Executive Branch Agencies 19

CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

Cases:

Buckley v. Valeo,
424 U.S. 1 (1976) 20
Ex Parte Bakelite Corp.,
279 U.S. 438 (1929) 20
Exxon Co., USA v. FERC,
182 F.3d 30 (D.C. Cir. 1999) 2
FCC v. Beach Communications, Inc.,
508 U.S. 307 (1993) 17
INS v. Chadha,
462 U.S. 919 (1983) 12, 13, 14, 19, 20
Miller v. French,
530 U.S. 327 (2000) 11, 18
National Coalition to Save Our Mall v. Norton,
269 F.3d 1092 (D.C. Cir. 2001) 4, 5, 18
Nixon v. Adm'r of Gen. Servs.,
433 U.S. 425 (1977) 15
Pennsylvania v. Wheeling & Belmont Bridge Co.,
59 U.S. (18 How.) 421 (1856) 11, 18
Plaut v. Spendthrift Farm, Inc.,
514 U.S. 211 (1995) 9, 12, 13
Robertson v. Seattle Audubon Soc'y,
503 U.S. 429 (1992) 6, 9, 10, 11, 18
Tesoro Alaska Petroleum Co. v. FERC ,
234 F.3d 1286 (D.C. Cir. 2000) 2
United States v. Klein,
80 U.S. (13 Wall.) 128 (1871) ..... *passim*

Page(s)

Statutes and Constitutional Provisions:

U.S. Const., Art. i, § 9,
Bill of Attainder Clause 15

U.S. Const., Art. iv, § 2,
Privileges and Immunities Clause 16

U.S. Const., amend. v, Due Process Clause . 7, 16, 18

U.S. Const., amend. v, Takings Clause 16

Administrative Procedure Act, 5 U.S.C. § 551. ... 20

Safe, Accountable, Flexible, Efficient
Transportation Equity Act: A Legacy
for Users ("SAFETEA-LU"), Pub. L.
No. 109-59, 119 Stat. 1144 (2005) 3, 10
§ 4412 ..... *passim*
§ 4412(b)(1) 3, 4, 6, 10, 14, 17
§ 4412(b)(2) 3, 6, 10, 15

Miscellaneous:

William D. Araiza, *The Trouble with Robertson: Equal Protection, The Separation of Powers, and the Line Between Statutory Amendment and Statutory Interpretation*,
48 CATH. U. L. REV. 1055 (1999) 13

Page(s)

J. Richard Doidge, *Is Purely Retroactive Legislation Limited by the Separation of Powers: Rethinking United States v. Klein*, 79 CORN. L. REV. 910 (1994) 21

Martin H. Redish, *Legislative Deception, Separation of Powers, and the Democratic Process: Harnessing the Political Theory of United States v. Klein*, 100 NW. U. L. REV. 437 (2006) 21

Lawrence G. Sager, *Klein's First Principle: A Proposed Solution*, 86 GEO. L.J. 2525 (1998) 21

BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTERESTS OF *AMICI CURIAE*

The interests of the Washington Legal Foundation are more fully set forth in the accompanying motion for leave to file this brief.[1]

WLF is concerned that the decision below eliminates all constraints on the ability of Congress to direct a result in a particular judicial proceeding, without repealing or amending the general law underlying the litigation. WLF believes that at least some restraints of that type are necessary to ensure that Congress exercises only those powers delegated to it under the Constitution and that its proceedings are not corrupted by the ability of a few individuals to obtain special treatment not available to others. Adherence to the rule of law demands nothing less.

STATEMENT OF THE CASE

This case involves a long-running proceeding before Respondent Federal Energy Regulatory Commission (FERC) regarding the allocation of funds generated from the flow of crude oil through the Trans Alaska Pipeline System ("TAPS"). The most recent

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than ten days prior to the due date, counsel for WLF provided counsel for Respondents with notice of its intent to file this brief.

phase of those proceedings began in 1993 and has involved several FERC decisions and several appeals to the U.S. Court of Appeals for the District of Columbia Circuit.

The proceedings neared their conclusion in 2004, when an Administrative Law Judge (ALJ) assigned by FERC to resolve several outstanding matters issued a 949-page Initial Decision ("ID") that decided the remaining disputes among TAPS participants.[2] It is uncontested that the ID determined that two Alaska-based oil refiners, Williams Alaska Petroleum, Inc. and Petro Star Inc., had significantly underpaid the Quality Bank for oil they removed from the TAPS common stream. Petitioner ExxonMobil has estimated that the two refiners' combined refund liability under the ID

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[2] As explained more fully in the Petition, the disputes centered around how TAPS participants would compensate one another for the fact that TAPS combines all the oil it receives from various companies into a common stream, and thus when a company is allocated oil at the south end of the pipeline in Valdez, Alaska, it "will not in all likelihood receive the same quality of oil at Valdez that it delivered to the pipeline." *Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286, 1287 (D.C. Cir. 2000). FERC in 1993 approved the methodology to be used in arriving at a value for the crude oil each participant placed into and withdrew from the pipeline stream (and thus how much money each participant would receive from, or be required to pay into, a "Quality Bank"). Subsequent proceedings before FERC and the D.C. Circuit have focused on arriving at appropriate compensation amounts using that methodology. The parties have been on judicial notice since a 1999 D.C. Circuit decision, *Exxon Co., USA v. FERC*, 182 F.3d 30 (D.C. Cir. 1999), that compensation would be payable for all oil that flowed through TAPS from 1993 forward. The appeals court explained that retroactive payments were warranted because the parties knew by at least 1993 that the prior, provisional valuation methodology was contested and subject to change. *Id.* at 49.

likely exceeded $125 million, dating back to December 1, 1993. Pet. 6. The decision was much more favorable to several TAPS participants; ExxonMobil, for example, was entitled to refunds in excess of $150 million under the ID. *Id.*

The Alaska oil refiners were disappointed with the ID. But they did not confine their appeals to the ongoing proceedings. Instead, they also appealed to the Alaska congressional delegation for assistance. The result of that appeal was July 2005 legislation adopted by Congress without hearings, committee reports, or floor debate. The legislation (which took the form of one provision in a massive appropriations bill) reversed the determination of the ALJ and thereby saved the Alaska oil refiners millions of dollars.[3] It declared that, with respect to the on-going TAPS proceedings and *no other proceedings*, FERC could not order Quality Bank adjustments for any period before February 1, 2000. § 4412(b)(1), Pet. App. 202a. The legislation then set forth, in § 4412(b)(2), the general law that would govern all other TAPS Quality Bank proceedings with regard to the award of retrospective adjustments. *Id.* at 202a-203a. Had that general law been made applicable to these proceedings, ExxonMobil would have been entitled to the full retrospective adjustments ordered by the ID, dating back to 1993. In other words, the limitation on retroactivity imposed by § 4412(b)(1) applied to these

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[3] *See* § 4412 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users ("SAFETEA-LU"), Pub. L. No. 109-59, 119 Stat. 1144 (2005). Section 4412 first appeared in the bill when the conference report was issued on July 25, 2005. SAFETEA-LU was passed by both houses of Congress the next day.

proceedings but to no other current or future TAPS Quality Bank proceedings.

Thereafter, this case proceeded in accord with § 4412(b)(1), not in accord with the ALJ's determination that refunds should be retroactive to 1993. The full Commission addressed only those refund claims for periods on or afer February 1, 2000, the date specified in § 4412(b)(1). Pet. App. 183. FERC agreed with the ALJ that retroactive refunds from February 1, 2000 onward were appropriate because (as the D.C. Circuit had noted earlier in its 1999 decision), the refiners were on notice in 1993 that the prior, provisional valuation methodology was contested and subject to change. *Id.* at 190a.

ExxonMobil sought review of FERC's decision in the D.C. Circuit. Among the issues it raised was its claim that § 4412 was unconstitutional under separation-of-powers principles. The D.C. Circuit affirmed FERC's decision in all respects. Pet. App. 1a-7a. The Court said, "[A]ny claim that Congress's decision here unconstitutionally exercised judicial power is foreclosed by our decision in *National Coalition to Save Our Mall v. Norton*, 269 F.3d 1092 (D.C. Cir. 2001)." *Id.* at 4a. ExxonMobil has appealed solely on the separation-of-powers issue.

REASONS FOR GRANTING THE PETITION

The petition raises issues of exceptional importance. Ever since its decision in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), this Court has recognized that there are limitations on how far Congress may go in adopting legislation that encroaches

on powers allocated by the Constitution to the other branches of government. *Klein* held that when Congress prescribes rules of decision in a pending adjudication without amending the law to make those rules generally applicable, it violates separation-of-power principles. 80 U.S. at 146.

Determining the precise line drawn by *Klein* has proven to be a difficult task for the many lower federal courts that have been faced with claims that specific federal statutes are unconstitutional on the grounds that they entail an inappropriate congressional exercise of judicial or executive power. The Petition lists a number of the many cases in which federal appeals courts have come to divergent conclusions regarding how *Klein* should be applied. Nonetheless, the difficulty of the task does not justify the D.C. Circuit's decision to abandon it altogether, as the D.C. Circuit has done in this case and in its prior *National Coalition* decision (on which it expressly relied in this case).

In adopting § 4412, Congress did precisely what *Klein* condemned: it prescribed a rule of decision in a proceeding that had been on-going for more than a decade in front of FERC and the D.C. Circuit, yet it indicated that that rule of decision should not apply prospectively in similar adjudications. By summarily rejecting a challenge to § 4412, the D.C. Circuit has made clear that it is unwilling to impose *any* constraints on Congress based on *Klein*. Review is warranted to provide guidance to the lower federal courts regarding what, if any, limitations *Klein* continues to impose on congressional actions.

This case is a particularly good vehicle for

addressing the scope and continued vitality of *Klein*. First, there is no credible argument – as has arisen in other cases raising *Klein* issues – that when it prescribed a rule of decision in this case, Congress also changed the underlying generally applicable law. The retroactivity rules adopted by § 4412(b)(2) for future TAPS Quality Bank proceedings are not the same as those imposed on this proceeding by § 4412(b)(1); under the rules established by § (b)(2), ExxonMobil would have been entitled to the full retroactive adjustments ordered by the ID. In *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429 (1992), because the Court determined that Congress's change in the generally applicable law made *Klein* inapplicable, it had no occasion to determine the precise scope of *Klein*; no similar vehicle problem exists here.

Second, this case raises separation-of-powers concerns in the starkest manner possible: it singles out one and only one adjudication for special treatment. A principal reason that the framers limited Congress's power to exercise adjudicative functions was their fear that a legislature that decides issues on a case-by-case basis (as many colonial legislatures did) is more likely to act oppressively. By requiring Congress to act generally, rather than particularly, separation-of-powers principles minimized the chance of oppressive legislation; the theory was that if everyone in a particular class were equally affected by a legislature's rule, all class members would act collectively to ensure that the legislature was fair to the class. If Congress is permitted to assume adjudicative functions, that safeguard is lost, and minorities without equal access to the Halls of Congress may find themselves treated less favorably than others similarly situated. The dangers of oppression are at

their peak when, as here, Congress has undertaken an adjudicative function in a manner that not merely adversely affects a small group of litigants, but rather confines its effects to a *single* judicial proceeding. Review is particularly warranted because of the singular nature of Congress's intervention into the adjudicative process; presumably, if *Klein* is to have any continued viability, the case for its application is strongest when, as here, Congress has acted in such a singular manner.

Third, review is appropriate because of all the constitutional provisions designed to protect individual rights, separation-of-powers is the one best suited for addressing issues of the sort raised here. For example, all agree that § 4412 violates ExxonMobil's rights under the Due Process Clause unless it has some rational basis. WLF has yet to hear any such rational basis articulated in this case. Yet, the rational basis test can be exceedingly difficult for courts to apply in practice. When, as here, supporters of § 4412 have come up with so many theories regarding why the statute should be deemed to have a rational basis, it can be very difficult for a reviewing court to separate the irrational from the just-barely-rational; no bright line separates the two. WLF submits that by granting review, the Court can articulate a bright-line *Klein* test that will permit lower courts to differentiate between legitimate congressional legislation and legislation that crosses the separation-of-powers line.

Finally, the fact that the underlying adjudicative proceedings involve both the Executive Branch and the judiciary does not detract from the appropriateness of using this case to examine the scope and viability of *Klein*. Separation-of-powers principles guard against

congressional intrusions into powers belonging to either of the other branches of government, not merely to the judiciary. Moreover, this Court has long viewed adjudicative proceedings before Executive Branch agencies – generally accompanied by appeal rights to Article III courts – as judicial in nature. Indeed, *Klein* itself involved congressional interference not with an Article III court but with the Court of Claims, which in the 19th Century was clearly understood to be an Article I court that lacked the powers exclusive to an Article III court.

I. This Case Is a Good Vehicle for Providing Guidance on *Klein*, Because Congress Did Not Amend Applicable Law When It Prescribed a Rule of Decision in the Case

Ever since its decision in *Klein*, this Court has recognized that there are limitations on how far Congress may go in adopting legislation that encroaches on powers allocated by the Constitution to the other branches of government.

Klein held unconstitutional, on separation-of-powers grounds, a federal statute that "prescribe[d] rules of decision to the Judicial Department of the government in cases pending before it." 80 U.S. at 146.[4]

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[4] *Klein* was a suit to recover the proceeds of property seized and sold by the Union Army during the Civil War. The plaintiff claimed a right to recovery based on legislation allowing recovery by the original owners of seized property if they could prove that they had been loyal to the Union. The Court had held in a prior case that receipt of a presidential pardon was sufficient proof of loyalty. After Klein prevailed in the Court of Claims, Congress in 1870

In the 137 years since that decision, it has been invoked to invalidate a federal statute only sparingly, and its precise meaning is still deemed far from clear. The Court recently observed, "Whatever the precise scope of *Klein*, however, later decisions have made clear that its prohibition does not take hold when Congress 'amend[s] applicable law.'" *Plaut*, 514 U.S. at 218 (quoting *Seattle Audubon*, 503 U.S. at 441).

Seattle Audubon provided the Court with a recent opportunity to clarify the scope and continued viability of *Klein*. The Court ultimately declined to utilize that opportunity, however, because it determined that the federal statute being challenged in that case (a statute governing timber sales in the Pacific Northwest) had not merely prescribed a rule of decision in pending cases but had "compelled changes in law." *Seattle Audubon*, 503 U.S. at 438. Under those circumstances, the Court concluded, *Klein* was inapplicable, because whatever the scope of *Klein*, it can only apply in those cases in which

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passed a statute providing that: (1) presidential pardons were not adequate proof of loyalty; and (2) acceptance of a pardon that specified that the recipient had supported the Confederacy was affirmative proof of *disloyalty*. The statute further directed that upon proof of acceptance of such a pardon, the Court of Claims and the Supreme Court should dismiss the suit for want of jurisdiction. 80 U.S. at 141-44. The Court struck down the 1870 statute on separation-of-powers grounds, holding that Congress exceeded its powers when it sought to prescribe rules of decision in pending cases such as Klein's. *Id.* at 146. The Court explained: "In the case before us no new circumstances have been created by legislation. But the court is forbidden to give the effect to evidence which, in its own judgment, such judgment should have, and is directed to give it an effect precisely contrary. [¶] We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial branch." *Id.* at 147.

Congress seeks to impose rules of decision in pending cases without amending the law to make those rules generally applicable. *Id.* at 441.

In contrast, there is no credible argument that when it prescribed a new rule of decision in *this* case, Congress also changed the underlying generally applicable law. The current generally applicable law governing future TAPS Quality Bank proceedings is set forth in SAFETEA-LU § 4412(b)(2). It provides that when ordering refunds to TAPS participants from the Quality Bank, FERC may order retrospective refunds back to a date 15 months before FERC's first adjustment order. That provision is essentially identical to the generally applicable law as it stood before adoption of § 4412.[5] But by virtue of § 4412(b)(1), Congress has decreed that in this proceeding and this proceeding only, FERC is not permitted to order retrospective refunds for the period preceding February 1, 2000. Thus, this case does not contain the feature – a change in applicable law – that prevented the Court in *Seattle Audubon* from addressing *Klein*'s scope and continued viability.[6]

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[5] In these proceedings, FERC issued its first order adjusting valuations on November 30, 1993. So § 4412(b)(2) would have authorized retrospective refunds to ExxonMobil dating back 15 months from that first order (*i.e.*, as far back as September 1992) – a date that considerably preceded the December 1, 1993 refund date established in the ALJ's decision.

[6] In any event, the D.C. Circuit decided the case on the understanding that § 4412 did not change the underlying general law to conform to the rule of decision made applicable to this case by § 4412(b)(1). Thus, any dispute by Respondents regarding the accuracy of that assumption would not be an appropriate issue for

Another feature of this case that makes it a particularly suitable candidate for review is that the only relief sought by ExxonMobil is the recovery of funds owed by virtue of its past TAPS shipments. The Court recently held that *Klein* is inapplicable to congressional statutes designed to alter prospective relief available in pending litigation. *Miller v. French*, 530 U.S. 327, 344 (2000) ("Prospective relief under a continuing executory decree remains subject to alteration due to changes in the underlying law."). In explaining *Klein*'s inapplicability, the Court said that the existence of pending litigation cannot restrict Congress's authority to declare what the law should be in the future, and thus that it makes no sense to permit a court to grant or keep in place prospective relief based on law that is no longer in effect. *Id.* at 347.[7] Similarly, the Court held in *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856), that Congress was entitled to adopt legislation declaring that a bridge

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resolution by this Court in the first instance. Rather, should the Court grant review and ultimately agree with ExxonMobil's understanding of *Klein*, Respondents would be free to raise the issue on remand.

[7] *Miller* also provides an alternative explanation for the Court's decision in *Seattle Audubon*. The plaintiffs in the latter case were seeking to maintain injunctions against certain timber sales in the Pacific Northwest. Congress adopted a statute that established new rules governing those sales, and all agreed that continued injunctive relief was likely unwarranted under the new statute. *Seattle Audubon*, 503 U.S. at 436. If one applies to *Seattle Audubon* the later holding in *Miller* (that Congress is always free to require application of new law to existing injunctive decrees), Congress did not violate separation-of-power principles when it passed legislation that effectively required the injunction against Northwest timber sales to be lifted.

no longer posed an unwarranted hazard to navigation, and thereby effectively require a court to lift an injunction against the bridge that was based on a legal conclusion that the bridge was, indeed, an unwarranted hazard to navigation.

This case does not involve any requests for prospective relief. Rather, as in *Klein*, the Petitioner seeks only a retrospective remedy: the recovery of funds owed to it from the Quality Bank. The absence of any claim for prospective relief that might prevent the Court from determining the scope and continued viability of *Klein* makes this case a particularly attractive candidate for review.

II. This Case Raises Separation-of-Powers Concerns in the Starkest Manner Possible: It Singles Out One Adjudication for Special Treatment

A federal statute raises particular separation-of-powers concerns when, as here, its works to the detriment of a single party in a single judicial proceeding. For example, Justice Breyer has stated: "[A]s Justice Powell has pointed out, the Constitution's 'separation-of-powers' principles reflect, in part, the Framers' 'concern that a legislature should not be able unilaterally to impose a substantial deprivation on one person.'" *Plaut*, 514 U.S. at 242 (Breyer, J., concurring in the judgment) (quoting *INS v. Chadha*, 462 U.S. 919, 962 (1983) (Powell, J., concurring in the judgment)). Review is particularly warranted because this case raises separation-of-powers issues in the very type of case that was the focus of Justice Powell's concern: a statute that focuses on a single judicial proceeding and imposes a

"substantial deprivation" on a single party. *See Seattle Audubon*, 503 U.S. at 441 (expressly reserving decision on whether legislation that targets pending adjudicative proceedings and that is challenged on separation-of-powers grounds is rendered unconstitutional by virtue of its focus on an extremely narrow subject matter).

Plaut explained at length that separation-of-powers principles were embedded in the Constitution in large measure in response to excessive interference by state legislatures with judicial proceedings during the colonial period. *Plaut*, 514 U.S. at 219-222. By the 1780s, many of the Framers, including Madison, Jefferson, and Hamilton, came to believe that the strict separation of legislative and judicial powers was necessary to avoid the dangerous concentration of power in the legislature. *Id.* at 221-22. "This sense of a sharp necessity to separate the legislative from the judicial power, prompted by the crescendo of legislative interference with private judgments of the courts, triumphed among the Framers of the new Federal Constitution." *Id.* at 221. By requiring Congress to act generally, rather than particularly, separation-of-powers principles minimized the chance of oppressive legislation; the theory was that if everyone in a particular class were equally affected by a legislature's rule, all class members would act collectively to ensure that the legislature was fair to the class. *See* William D. Araiza, *The Trouble with Robertson: Equal Protection, The Separation of Powers, and the Line Between Statutory Amendment and Statutory Interpretation*, 48 CATH. U. L. REV. 1055, 1089-1093 (1999); *Chadha*, 462 U.S. at 962 (Powell, J., concurring in the judgment).

If Congress is permitted to assume adjudicative

functions, that safeguard is lost, and minorities without equal access to the halls of Congress may find themselves treated less favorably than others similarly situated. The dangers of oppression are at their peak when, as here, Congress has undertaken an adjudicative function in a manner that confines its adverse effects not (as is often true) to a small group of litigants, but rather to a *single* judicial proceeding. For example, in voting to strike down, on separation-of-powers grounds, a legislative veto that permitted either the House or Senate to overrule an ALJ's decision to suspend the deportation of an individual alien, Justice Powell warned:

> The impropriety of the House's assumption of this function is confirmed by the fact that its action raises the very danger the Framers sought to avoid – the exercise of unchecked power. . . . The only effective constraint on Congress' power is political, but Congress is most accountable politically when it prescribes rules of general applicability. When it decides rights of specific persons, those rights are subject to "the tyranny of a shifting majority."

Chadha, 462 U.S. at 966 (Powell, J., concurring in the judgment).[8] In sum, § 4412(b)(1)'s focus on but a single

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[8] The manner in which § 4412 was adopted bears out Justice Powell's fear that political constraints are inoperative when Congress considers legislation affecting only a single proceeding. Congress adopted § 4412 without a hearing, a committee report, or floor debate. It was added to a massive appropriations bill, at the behest of the Alaska congressional delegation, on the evening before the bill was adopted.

judicial proceeding renders Congress's adoption of the statute particularly problematic under separation-of-powers principles and highlights the importance of granting review.

WLF acknowledges that, on at least one occasion when deciding whether federal legislation unfairly singled out an individual for adverse treatment, the Court has suggested that Congress may properly legislate with respect to "a legitimate class of one." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 472 (1977). But that statement arose in connection with the Court's consideration of a claim under the Bill of Attainder Clause, not with respect to a separation-of-powers claim. Moreover, the Court's basis for determining that Congress had not violated the Bill of Attainder Clause was that President Nixon failed to demonstrate that the challenged statute imposed a punishment on him; the Court mentioned only in passing that it believed that Congress could properly treat President Nixon as different from all other Presidents. WLF respectfully suggests that *Nixon* is not relevant to *Klein* cases, in which courts have shown particular concern with regard to congressional legislation that focuses on but a single proceeding.

In any event, there is no evidence to suggest that this particular proceeding could possibly qualify as "a legitimate class of one." There is no principled difference between this proceeding and any other TAPS Quality Bank adjustment proceeding, yet § 4412(b)(2) provides that other such proceedings are not subject to the rule of decision imposed by Congress on this case. In the absence of such a principled difference, Congress's adoption of a statute that imposes a

substantial deprivation on parties to a single proceeding (and on no others) highlights the importance of granting review to consider the scope and continued vitality of *Klein*.

III. Separation-of-Powers Analysis Provides the Most Appropriate Means of Addressing Cases of This Sort

The Constitution includes a number of provisions intended to protect individuals from being treated unfairly by the federal government. In addition to separation-of-powers principles, other provisions protecting individuals in a civil context from unequal treatment include the Fifth Amendment's Due Process and Takings Clauses, Article I, § 9's Bill of Attainder Clause, and Article IV, § 2's Privileges and Immunities Clause. Indeed, in the court of appeals ExxonMobil argued that Congress's adoption of § 4412 also violated the Due Process Clause (including that clause's equal protection component).

Each of the provisions cited above at least arguably was violated by the adoption of § 4412. WLF nonetheless respectfully submits that for cases arising in this context (*i.e.*, congressional adoption of a statute that applies a new rule of decision to a pending case without simultaneously changing existing law), separation-of-powers is the constitutional principle best suited to addressing a claimant's assertion that he has been unfairly treated. The courts are capable of establishing bright-line rules to apply to separation-of-powers claims that are not so easily drawn in cases asserting other constitutional claims.

ExxonMobil's assertion of a due process violation provides a good illlustration. The D.C. Circuit correctly recognized that for § 4412 to be sustained in the face of a due process or equal protection claim, there must exist a "'reasonably conceivable state of facts that could provide a rational basis for' it." Pet. App. 4a (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993)). ExxonMobil has presented powerful arguments that § 4412 lacks a rational basis. Pet. 17. But given the leniency of that standard, courts are often very reluctant to conclude that a statute lacks any conceivable rational basis, even when (as here) all of the purported rationales make little or no sense.[9] Under

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[9] In defense of § 4412's rationality, the D.C. Circuit said that "Congress could easily have concluded that limiting the retroactivity of refunds would help provide certainty to parties affected by FERC's decision." Pet. App. 4a. That is utter nonsense. A law can provide "certainty" only by establishing new rules with future application. Section 4412(b)(1) had no future application; it simply redistributed the economic pie among companies that had used TAPS between 1993 and 2000, and at the same time made clear that the reallocation formula would *not* apply in future proceedings. Moreover, the company that had the most to gain from § 4412, Williams Alaska Petroleum, Inc., had sold its Alaska refining operations by the time § 4412 was enacted and thus had no reason to seek any sort of certainty regarding future TAPS Quality Bank proceedings.

Some shippers argued in the D.C. Circuit that § 4412 could be viewed as a "rational compromise between the parties advocating complete retroactivity and those advocating no retroactivity." But simply because some parties made self-serving arguments opposing retroactivity (arguments which were completely rejected by the ALJ) does not render rational Congress's decision to provide them with substantially more than half of loaf. Given the absence of any articulatable basis for challenging the ALJ's allocation of Quality Bank obligations under the allocation formula adopted in 1993

those circumstances, the Due Process Clause loses its utility as a means of correcting unfair treatment of individuals in cases of this sort. It is simply too difficult for a reviewing court to separate the irrational from the just-barely-rational in these types of cases; no bright line separates the two.

In contrast, the *Klein* doctrine provides the Court with an opportunity to establish a relatively clear line between permissible congressional statutes and those that cross the line into an unconstitutional exercise of judicial power. The Court could establish a bright-line rule, based on *Klein*, that a statute violates separation-of-powers principles when it: (1) establishes a rule of decision in a single pending lawsuit (or a very small number of lawsuits) seeking a retrospective remedy; (2) fails simultaneously to amend generally applicable law to conform to that rule of decision. Review is appropriate to determine whether such a bright-line rule is warranted. By limiting the rule to pending lawsuits seeking a *retrospective* remedy, the Court can avoid difficulties that arise -- particularly with respect to defining what constitutes generally applicable law -- whenever the plaintiff is seeking prospective relief, such as an injunction. *See, e.g., Miller v. French*; *Seattle Audubon*; *Pennsylvania v. Wheeling & Belmont Bridge Co.*; *National Coalition to Save Our Mall v. Norton*. In contrast, such difficulties are unlikely to arise when

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(indeed, the D.C. Circuit rejected all challenges to that allocation) and given the awareness of all parties since 1993 that the prior, provisional allocation methodology was contested and subject to change, Congress's alleged desire to arrive at a "compromise" reallocation of funds does not provide a rational basis for adoption of § 4412.

Congress is stepping into a pending lawsuit for the sole purpose of re-allocating economic resources among competing litigants.

IV. *Klein* Applies to Cases, as Here, That Involve Proceedings Both Before Article III Courts and Before Executive Branch Agencies

The most recent phase of these proceedings has been on-going since 1993. The proceedings have included multiple decisions by an Article III court: the D.C. Circuit. They have also included numerous decisions by a federal administration agency (FERC) acting in an adjudicatory capacity.

The inclusion of an Executive Branch agency in the adjudicatory process does nothing to detract from the appropriateness of using this case as a vehicle for examining the scope and viability of *Klein*. Separation-of-powers principles guard against congressional intrusions into powers belonging to either of the other branches of government, not merely those belonging to the judiciary.

Moreover, this Court has long viewed adjudicative proceedings before Executive Branch agencies – generally accompanied by appeal rights to Article III courts – as judicial in nature. As Justice Powell explained in *Chadha*:

> We have recognized that regulatory agencies and departments of the Executive Branch often exercise authority that is "judicial in nature."

> *Buckley v. Valeo*, 424 U.S. 1, 140-41 (1976). This function, however, forms part of the agencies' execution of public law and is subject to procedural safeguards, including judicial review, provided by the Administrative Procedure Act, see 5 U.S.C. § 551 *et seq.*

Chadha, 462 U.S. at 966 n.10 (Powell, J., concurring in the judgment). Where Executive Branch agencies are properly exercising powers that are judicial in nature and that are subject to review by Article III courts, there is every reason to provide those activities with the same protection against congressional encroachment that is afforded to Article III courts.

Indeed, *Klein* itself involved congressional interference not with an Article III court but with the Court of Claims, which in the 19th Century was clearly understood to be an Article I court that lacked the powers exclusive to an Article III court. *See, e.g., Ex Parte Bakelite Corp.*, 279 U.S. 438, 455 (1929) (the Court in *Klein* made clear its understanding that the Court of Claims was an Article I court). Yet, the Court in *Klein* nonetheless did not hesitate to rule that Congress had violated separation-of-powers principles when it supplied a rule of decision in an ongoing Court of Claims proceeding. Similarly, the mere fact that a portion of the adjudicative proceedings at issue here took place in hearings conduct by an Executive Branch agency should not cause the Court to hesitate in granting review in this case to clear up the widespread confusion regarding the meaning of *Klein*.

That such widespread confusion exists is not open to serious challenge. In addition to the confusion among

the federal appeals courts cited by the Petition, legal commentators have repeatedly expressed similar confusion. *See, e.g.*, Martin H. Redish, *Legislative Deception, Separation of Powers, and the Democratic Process: Harnessing the Political Theory of United States v. Klein*, 100 NW. U. L. REV. 437, 438 (2006); Lawrence G. Sager, *Klein's First Principle: A Proposed Solution*, 86 GEO. L.J. 2525 (1998); J. Richard Doidge, *Is Purely Retroactive Legislation Limited by the Separation of Powers: Rethinking United States v. Klein*, 79 CORN. L. REV. 910, 918 (1994). WLF respectfully submits that this Petition provides the Court with an ideal opportunity to seek to resolve that confusion.

CONCLUSION

Amicus curiae Washington Legal Foundation respectfully requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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